Supreme Court, U.S.
FILED
JAN 10 2000
CLERK

NO. 99-901

IN THE SUPREME COURT OF THE UNITED STATES

BRENTWOOD ACADEMY,

Petitioner,

v.

TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION and RONNIE CARTER, Executive Director and Individually,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONSE TO MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* MEMPHIS UNIVERSITY SCHOOL, ST. AGNES ACADEMY, CHRISTIAN BROTHERS HIGH SCHOOL, HUTCHISON SCHOOL, HARDING ACADEMY, LAUSANNE COLLEGIATE SCHOOL, ST. MARY'S EPISCOPAL SCHOOL, BRIARCREST CHRISTIAN SCHOOL, EVANGELICAL CHRISTIAN SCHOOL, AND FIRST ASSEMBLY CHRISTIAN SCHOOL

The Respondents, Tennessee Secondary School Athletic Association and Ronnie Carter, submit this response to the motion of *amici curiae* Memphis University School and others for leave to file a brief. The motion is not well taken and should be denied.

The state action argument on pages 11-20 of the proposed *amici curiae* brief does not bring to the attention of the Court any relevant matter not already brought to the Court's attention by the parties. This portion of the proposed brief recites various statements of fact purportedly made by the District Court in a written decision that is already before this Court. The brief then recites legal arguments that add nothing new to the arguments already

made by the Petitioner. Indeed, in some instances, the *amici curiae* simply rely upon arguments already made by the Petitioner.

Pages 4-10 of the proposed brief of *amici curiae* includes excerpts from handbooks, mission statements, and web pages of private schools. These excerpts are quoted in an effort to show the importance of athletics in those schools' programs. The importance that a given school may place on interscholastic athletic competition is simply not the issue before this Court. The issue is whether TSSAA is a state actor whose regulation of interscholastic athletic competition between its voluntary members is constrained by constitutional requirements and prohibitions.

The various excerpts quoted by *amici curiae* do provide some enlightenment, although the enlightenment does not pertain to the issue about which *amici curiae* seek to persuade the Court. In the context of this First Amendment challenge to the TSSAA recruiting rule, one of the excerpts quoted by *amici curiae* jumps from the page. That is the excerpt from the St. Agnes Academy handbook which speaks of the school's athletic programs "which are based on the teachings of Christ . . . ." This facet of the St. Agnes Academy athletic program is plainly one that a state actor could not regulate. The Christianity-based regulation of the St. Agnes Academy athletic program is a function of the academy alone. This excerpt from the mission statement points up the limited role that TSSAA plays. St. Agnes Academy decides what sort of athletic program it will conduct. TSSAA simply enforces its own rules of interscholastic competition should St. Agnes Academy decide that it wishes to conduct its program in accordance with those rules as a member of the association.

Amici curiae also quote from the web page of Girls Preparatory School, a private school in Tennessee. That web page, at *www.gps.edu*, reveals that swimming, diving, crew, and cheerleading are among the sports offered by GPS to its students. TSSAA does not regulate swimming, diving, crew, or cheerleading. The GPS web page thus shows that interscholastic athletic competition takes place between schools in Tennessee outside of or apart from any regulation by TSSAA. The same is revealed in the web page of *amicus curiae* Hutichson School, a private school in Tennessee. The Hutchison School web page, at *www.hutchisonschool.org*, includes the following information:

> "Hutchison's swim team will face tougher competition this year, having joined the Shelby County Swim League. Hutchison will compete against more private and county schools, including Germantown, Bartlett, Collierville, and Houston. The Sting will also swim four half-meets instead of three meets, a league championship and the state meet."

TSSAA does not regulate interscholastic athletic competition in the sport of swimming. *Amicus curiae* the Hutchison School will compete interscholastically, and will compete for a state championship, in swimming without any involvement on the part of TSSAA. The Hutchison School interscholastic swimming competition schedule, also included at its web page, shows that *amici curiae* Memphis University School, St. Agnes Academy, Christian Brothers High School, Lausanne Collegiate School, St. Mary's Episcopal School, Briarcrest Christian School, and Evangelical Christian School all participate in this interscholastic swimming competition with the Hutchison School, competition for state championships without any regulation by TSSAA.

The web pages of some of the schools outside of Tennessee are also revealing. For example. Haverford School, at *www.haverford.org*, shows that the school is a member of

the "Inter-Academic Athletic Association of Philadelphia and vicinity," referred to as the oldest high school league in the country. Haverford's web page does not mention the Pennsylvania Interscholastic Athletic Association, the counterpart of TSSAA. In addition, the web page does show that Haverford competes interscholastically in sports which the Pennsylvania Interscholastic Athletic Association does not regulate.

The web page of the Delbarton School, at *www.delbarton.org*, reflects that the Delbarton School engages in interscholastic athletic competition in New Jersey. The Delbarton School is a member of the parochial school division of the New Jersey State Interscholastic Athletic Association. Another New Jersey private school, Purnell School, with a web page at *www.purnell.org*, also engages in interscholastic athletic competition outside of the NJSIAA, the New Jersey counterpart to TSSAA. Purnell competes interscholastically in two athletic leagues, the New Jersey Association of Independent Schools Athletic Association and the New Jersey Prep Conference. Plainly, the NJSIAA is not "the only game in town."

The manner in which each of the *amici curiae* chooses to operate its athletic program is an individual school-based decision. It is up to the school whether to field teams for interscholastic athletic competition at all. Determination of sports in which it may compete is the school's decision. Whether it chooses to engage in sports competition independently, as a member of TSSAA, or as a member of some other association is solely the school's decision. Whether a private school may believe athletics plays an important role in the educational

process is inconsequential.[1] Such a belief does not turn interscholastic athletic competition into a necessary part of the public education provided by the state. Accordingly, such a belief does not turn the regulation of interscholastic athletic competition into a government function. There are no state laws in Tennessee, and *amici curiae* cite no state laws elsewhere, that require students to participate in interscholastic athletic competition or require schools to provide competitive interscholastic athletic programs.

The proposed brief of *amici curiae* adds nothing to the argument of the Petitioner. The information supplied by *amici curiae* is relevant, if at all, because it ultimately reveals that interscholastic athletic competition takes place in Tennessee and in other states outside of and apart from any regulation by TSSAA or any other particular association.

The proposed brief of *amici curiae* Memphis University School and others does not serve the purpose of an *amicus curiae* brief, burdens the Court, and should not be filed.

Respectfully submitted,

W. Ovid Collins, Jr.
CORNELIUS & COLLINS
Suite 2700, Nashville City Center
511 Union St.
P.O. Box 190695
Nashville, Tennessee 37219
(615)244-1440

Counsel of Record

[1] Many private schools, including some of the *amici curiae*, believe the teaching of Christian religious doctrine is also important in their educational process. Indeed, the Petitioner itself has a "spiritual" side to it's philosophy-defining triangle. *Amici curiae* certainly would not insist, however, that classes in Christian religion are therefore essential to any education, private or public.

Charles Hampton White

Richard L. Colbert
CORNELIUS & COLLINS
Suite 2700, Nashville City Center
511 Union Street
P.O. Box 190695
Nashville, Tennessee 37219
(615)244-1440

Attorneys for Respondents

CERTIFICATE OF SERVICE

I certify that three copies of the foregoing Response to Motion for Leave to File Brief of *Amici Curiae* have been supplied to G. Thomas Nebel, Esq., Law Offices of Tom Nebel, P.C., 501 Union Street, Suite 504, Nashville, Tennessee, 37219, H. Lee Barfield, Esq., Bass, Berry & Sims, PLC, 2700 First American Center, Nashville, Tennessee, 37238, James F. Blumstein, Esq., Professor of Law, Vanderbilt Law School, Nashville, Tennessee, 37240-0016, W. Thomas Hutton, Esq., Robert E. Orians, Esq., Shea Sisk Wellford, Esq., Martin, Tate, Morrow & Marston, P.C., 22 North Front Street, Suite 1100, Memphis, Tennessee, 38103-1182 on this 10th day of January, 2000.

Richard L. Colbert